IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WRS, INC., d/b/a WRS MOTION PICTURE LABORATORIES, a corporation Plaintiff, v. PLAZA ENTERTAINMENT, INC., et al. Defendants	)	No. 2:00-CV-2041-AJS

REPLY TO WRS OPPOSITION TO MOTION UNDER RULE 60

Defendant Charles von Bernuth ("Mr. Von Bernuth") hereby submits this Reply to the Opposition of WRS to his Motion for Relief under Rule 60, as follows:

1. To the extent the Court would require Mr. Von Bernuth to show the existence of a meritorious defense, in its papers WRS has not contested that the existence of such a defense should be determined under the summary judgment standard. If that standard is applied, then the various allegations contained in WRS's Response to Mr. Parkinson's Affidavit do no more than show the existence of factual disputes precluding summary judgment.[1] These disputes of fact only illustrate that this case cannot properly be disposed of as a matter of law, as WRS has contended, but rather that a trial is required to determine whether and to what extent Mr. Von Bernuth is liable to WRS. *El v. SEPTA*, 479 F.3d 232, 238 (3d Cir. 2007) ("Specious objections will not, of course, defeat a motion for summary judgment, but real questions about credibility, gaps in the evidence, and doubts as to the sufficiency of the movant's proof, will").

Beyond this, Eric Parkinson has now submitted a second Affidavit which addresses several arguments made in WRS's response. For example, WRS maintains that it was

[1] Notably, none of WRS's Responses are supported by an Affidavit from Jack Napor or otherwise.

unable to collect Plaza receivables because of the ability of customers to return tapes that they could not resell. But returns do not explain how Plaza's debt to WRS could have ballooned to nearly twice the amount owed as of the date of the Services Agreement. As explained by Mr. Parkinson, only a few Plaza customers (Walmart is the prime example) were provided with tapes on consignment with the right to return unsold tapes. Most Plaza customers did not have any right to return unsold tapes. Accordingly, returns cannot explain WRS's alleged inability to collect Plaza receivables and it certainly cannot explain how Plaza's debt to WRS allegedly doubled after the Services Agreement.

WRS claims that it could not realize any value from the Plaza inventory it held because the inventory could not be sold without violation of copyrights. In his second Affidavit, Mr. Parkinson attests that he is aware of evidence that WRS did sell tapes in violation of copyright laws. Certain such claims have been asserted as counterclaims in this case, but have never been resolved. See counterclaims of Von Bernuth, Parkinson and Plaza in the case at 03-1398 (W.D. Pa.). Moreover, if it is true that WRS did not sell Plaza's inventory, then where is it now? The tapes have value and have never been returned to Plaza. Furthermore, as pointed out in Mr. Parkinson's first Affidavit, when there was an opportunity to sell some of the inventory and derive funds for WRS and Plaza to split, WRS refused to release the tapes it held. (See Original Parkinson Affidavit at ¶ 48).

WRS's response to the ballooning of the debt Plaza allegedly owed is notable for the complete failure to explain why, following the Services Agreement, tapes would be produced and receivables generated but then allegedly not collected. WRS simply relies on the contention, disputed by Mr. Parkinson, that Plaza was authorizing the production of the tapes. But as pointed out in Mr. Von Bernuth's original Brief, the law imposes obligations on WRS to act reasonably with respect to extension of credit and generation of debt allegedly personally guaranteed by Mr. Von Bernuth. The Services Agreement contained provisions which required that no "New Invoice" should go unpaid for more than 89 days. WRS's own accounting clearly shows that this provision was not implemented by WRS in breach of the Agreement and its duties to Mr. Von Bernuth. Otherwise, Plaza's debt to WRS could not have nearly doubled --as is alleged by WRS-- following the date of the Services Agreement. Thus, even if it were true that Plaza authorized new work for which it could not pay, that is no response to Mr. Von Bernuth's argument based on WRS's legal obligation to protect him by enforcing the Services Agreement and limiting his exposure no matter what Plaza may have been authorizing.

WRS makes no response to several points raised by Mr. Von Bernuth and it has responded only weakly to others. For instance, Mr. Parkinson says that WRS kept all of the money in the lock box but has given Plaza only one-half credit for such payments in its accounting. WRS makes no response. Further, Mr. Parkinson provided evidence of payments made on Plaza receivables that were not recorded in the lock box account. WRS's responds that some payments continued to be made directly to Plaza. But WRS does not allege that the payments evidenced in the Parkinson Affidavit were made directly to Plaza and has provided no evidence from which such a proposition could be reasonably inferred. In his second Affidavit, Mr. Parkinson has provided documentation showing that the customer (Video Products Distributors) which made direct payments to Plaza had been specifically exempted from the WRS lockbox arrangement with the full knowledge and concurrence of WRS. The same is not true in the case of Anderson Merchandisers, which provided the evidence of payments not shown on WRS's lockbox accounting. (See Paragraph 28 of Mr. Parkinson's Original Affidavit).[2]

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[2] The jurisdictional issue highlighted by the Court has already been addressed in the Supplement to Mr. Von Bernuth's Motion. There appears to be no substantial difference in the positions of the parties on this issue.

2. WRS claims that Mr. Von Bernuth should have acted more promptly in presenting his Rule 60 Motion. In Reply, Mr. Von Bernuth's Second Affidavit has been submitted to recount in detail the actions he took from the time of his discovery of the defaults to the filing of the Rule 60 Motion on October 16, 2007. This Affidavit demonstrates that given the circumstances in which he had to operate, such as needing Affidavits from persons over whom he has no control, which led to delays also beyond his control, Mr. Von Bernuth acted as promptly as possible in filing the Motion.

Moreover, the time needed to present the Motion would be significant only if it led to prejudice to WRS. WRS makes only the most general allegation of prejudice, and it has submitted ***absolutely no evidence*** of any. Indeed, review of Mr. Napor's deposition, which began in 2005 and concluded in January 2006, shows that the loss of WRS employees and records, which is now attributed to Mr. Von Bernuth's alleged delay, had in fact already occurred as of the time of the deposition. (See attachment A hereto). Potential witness Joe Gerek had already gone to Florida by then. (Napor Depo. at 239) Melanie Verlin had also left WRS's employ. *Id.* Other witnesses, although no longer employed with WRS, were nonetheless living in the Pittsburgh area and available to WRS. *Id.* In short, there is no evidence that WRS is in any different position now than it was two years ago in terms of its ability to prove its claims, yet it has now tellingly acknowledged that "employees with knowledge of the specific events that occurred" are no longer available to WRS. Indeed, WRS comes close to admitting what Mr. Von Bernuth has argued -- that Mr. Napor does not have personal knowledge of the facts necessary to establish WRS's claim.

3. Another point WRS has not contested is that it never gave Mr. Von Bernuth notice of acceptance of his guaranty. (See Principal Brief at 14, n.6). In his Second

Affidavit, Mr. Von Bernuth states that no copy of the Services Agreement executed by WRS was delivered to him and that he first learned of WRS's purported acceptance of the Agreement when served with the Complaint in this action. Under these facts, Mr. Von Bernuth has a complete defense irrespective of the factual disputes with respect to WRS's breaches of the Services Agreement and disputes about the actual amounts that Plaza might owe to WRS.

"A suretyship may only be enforced by an obligee against a surety where the obligee affirmatively accepts the suretyship contract within a reasonable time inasmuch as such notice enables the surety to know the nature and extent of its liability." *Deeter v. Dull Corp.*, 617 A.2d 336, 341 (Pa. Super. 1992); *accord Acme Mfg. Co. v. Reed*, 47 A. 205, 207 (1900). As explained by the Pennsylvania Supreme Court,

> There is no principle of the law of contracts more firmly settled than that a guarantor of future credit or advancing is entitled to notice from the party giving the credit, of his acceptance of the guaranty, unless, indeed, the agreement to accept be contemporaneous with it. . . . Without such notice there is no contract . . . .

Acme Mfg. Co., 47 A. at 206. On facts identical to those in this case, *Acme* held:

> The absence of notice of acceptance by the plaintiffs to the defendant is fatal to their claim. When the defendant signed the guaranty, it was his proposition only. The contract which he proposed to guaranty had not been executed or accepted by the plaintiffs. True, they did execute it soon afterwards, yet they gave no notice thereof to the defendant. This rule that a guarantor must have notice of the acceptance of his guaranty by the guarantee "is in itself a reasonable rule, enabling the guarantor to know the nature and extent of his liability; to exercise due vigilance in guarding himself against losses, which might otherwise be unknown to him; and to avail himself of the appropriate means in law and equity to compel the other parties to discharge him from future responsibility."

Id. at 207. The rule requiring notice of acceptance applies in this case, and WRS's failure to give such notice is fatal to its claims against Mr. von Bernuth.

In conclusion, the record in this case clearly shows, at a minimum, that factual disputes exist, that judgment as a matter of law is not appropriate and that a trial is necessary. For all the reasons now put forward on the record, relief under Rule 60 is appropriate.

Respectfully submitted,

/s/ James R. Walker s

James R. Walker, Esquire
Pa I.D. # 42175
Manion McDonough & Lucas, P.C.
Firm I.D. No. 786
600 Grant Street, Suite 1414
Pittsburgh, PA 15219
jwalker@mmlpc.com
(412) 232-0200

Attorney for Defendant Charles von Bernuth

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